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In the Supreme Court of the United States

OCTOBER TERM, 1995

CHRISTOPHER A. FELIX, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

PETITION FOR WRIT OF CERTIORARI

JAY LINDSEY COHEN
Colonel, United States Air Force
Chief, Appellate Defense Division
Counsel of Record

MARGE A. OVERLY
Captain, United States Air Force
Appellate Defense Counsel
Counsel for the Petitioner

AIR FORCE LEGAL SERVICES AGENCY
Appellate Defense Division
172 Luke Avenue, Suite 208
Bolling AFB, DC 20332-5113

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QUESTIONS PRESENTED

I. Whether the pleas to Charge II and its specifications were improvident because the facts indicate the petitioner, while in correctional custody, was subjected merely to moral restraint, not physical restraint, a required element of the crime.

II. Whether the Air Force Court of Military Review, a majority of which disagreed with the original panel's decision, erred by deciding the case at bar *en banc,* on the basis that the providency of the petitioner's pleas was a "question of exceptional importance" within the meaning of Rule 17 of the Courts of Military Review Rules of Practice and Procedure.

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The petitioner, Christopher A. Felix, respectfully prays that a writ of certiorari issue to review the order and judgment of the United States Court of Military Appeals entered on 16 September 1994.

OPINIONS BELOW

The order and judgment of the United States Court of Military Appeals, USCMA Dkt. No. 93-0861 (C.A.A.F. 1994) is reprinted at Appendix A. The decision of the United States Air Force Court of Military Review, is reported at 36 M.J. 903 (A.F.C.M.R. 1993), and is reprinted at Appendix B.

JURISDICTION

The final order of the United States Court of Military Appeals was entered on 16 September 1994. The jurisdiction of this Court is invoked under 28 U.S.C.A. § 1259(3) (Supp. 1993) and 10 U.S.C.A. § 867(a) (Supp. 1993).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The Court of Military Review, Rules of Practice and Procedure, (22 M.J. CXXVII, 1 March 1985), Rule 17. *En Banc Proceedings.* (a) states,

> A majority of the judges present for duty may order that any appeal or other proceeding be considered or reconsidered, except as indicated in section (c) below, by the Court sitting as a whole. Such consideration or reconsideration ordinarily will not be ordered except (1) when consideration by the full Court is necessary to secure or maintain uniformity of decision, or (2) when the proceedings involve a question of exceptional importance, or (3) when a sentence being reviewed pursuant to Article 66 extends to death.

Article 134, UCMJ, Manual for Courts-Martial (1984), sets forth the elements of the crime of escaping from correctional custody in paragraphs 70.b.(1)(b) and (c), which state, respectively, "That, while in such correctional custody, the accused was under physical restraint;" and, "That the accused freed himself or herself from the physical restraint of this correctional custody before being released therefrom by proper authority . . ."

STATEMENT OF THE CASE

On 6 February 1991, the petitioner was punished nonjudicially pursuant to Article 15, UCMJ, by being put in correctional custody. Pros.Ex. 1. On 9 and 13 February 1991, the petitioner left the correctional custody facility without permission. Pros.Ex. 1. These departures violated Operating Instruction 39-6, of the Correctional Custody Facility. Pros.Ex. 4 and 5.

Petitioner was charged with, and entered conditional guilty pleas to, failing to obey an order not to consume alcohol (Article 92) and escaping from correctional custody (Article 134). During the providency inquiry, the petitioner agreed with the judge's suggestion that by being in correctional custody, the petitioner was under physical restraint. R. 34, 36. Later, in his unsworn statement, the petitioner said that there was "no security in [the correctional custody facility] whatsoever" and that he "just walked out the back door." R. 107.

On appeal to the Air Force Court of Military Review, the case was initially decided by a panel consisting of Senior Judge Leonard, Judge James, and Judge Johnson. *United States v. Felix,* 36 M.J. 903, 913, n. 11. (A.F. C.M.R. 1993) (James, J., dissenting). That panel of judges "voted and agreed on an opinion that set aside all the findings of guilty." *Id.* On 2 October 1992, the Court decided to consider the case *en banc.* On 10 February 1993, in a decision consisting of four separate opinions, the majority set aside the findings as to Charge I and its specification and reduced the period of confinement from five months to four months pursuant to a reassessment of sentence. *United States v. Felix,* 36 M.J. 903 (A.F.C.M.R. 1993). The Court of Military Appeals, on 16 September 1994 affirmed that Court's decision. The Court found that Rule 17 was not an exclusive list of the time when *en banc* review by the Court of Criminal Appeals is permissible. The Court, in deciding that the plea was provident, relied upon the fact that the appellant had stated, during the plea inquiry, that he was under physical restraint. Thus, the Court failed to address the salient issue of whether the evidence which came to light after the inquiry were inconsistent with the appellant's original statement, rendering the plea improvident.

REASONS FOR GRANTING THE WRIT

I. THE PLEAS TO CHARGE II AND ITS SPECIFICATIONS ARE IMPROVIDENT SINCE THE FACTS INDICATE THAT PETITIONER'S CORRECTIONAL CUSTODY CONSISTED OF NO PHYSICAL RESTRAINT.

Where matters inconsistent with a plea of guilt are presented at trial, the guilty plea cannot stand. Article 45(a), UCMJ, 10 U.S.C. § 845(a). The petitioner's two statements, as set forth above, were in substantial conflict with the petitioner's earlier concession that his status of being in correctional custody meant he was under physical restraint, as embraced by Article 134, paragraph 70. The military judge was required to resolve the conflict or enter pleas of not guilty on behalf of the petitioner. Article 45(a), UCMJ, 10 U.S.C. § 845(a).

Of the four elements constituting the offense of escape from correctional custody, the second element – that "while in such correctional custody, the accused was under physical restraint," MCM, Part IV, paragraph 70(b)(1)(b) – is where the problem with the petitioner's case rests. In resolving this problem against the petitioner, the Court of Military Appeals relied upon the reading of paragraph 70(c)(1), MCM, Part IV (United States, 1984), which in effect says that escape from correctional custody is when a person in correctional custody "casts off" *any* of the physical restraint that has been imposed.

The majority decision of the Air Force Court of Military Review, in this case, cited Part V of the MCM and Department of the Army Pamphlet 27-9, for the proposition that one "in correctional custody is *always* under physical restraint." *United States v. Felix,* 36 M.J. 903, 906-907 and n. 8 (A.F.C.M.R. 1993). In reaching this conclusion the Air Force Court of Military Review noted that "The fact that correctional custody anticipates and man-

dates periods when the correctee is subject to moral restraint does not cancel the inherent status of physical restraint." *Id.* at 908. The court's conclusions on this matter render the second element of the offense unnecessarily redundant.

Further, the petitioner's statement that there was no security in the facility was supported by the government's evidence at trial. Prosecution exhibit 5 repeatedly refers to the correctional custody system as operating on an honor system. Trial counsel repeatedly argued that the petitioner violated this honor system and that he must now be physically restrained behind bars. R. 123, 126. Significantly, the monitor of the correctional custody facility said that after the petitioner departed the facility, the rules were changed to require the monitor to perform two bedchecks. R. 70-74. Both before and after the petitioner's departure, the "monitor" is allowed to sleep during the evening hours. In the end, all of the evidence was consistent with the "essence" of correctional custody at Nellis Air Force Base, involving nothing more than mere moral suasion during the evening hours, not physical restraint.

There was substantial conflict between the statements during the guilty plea and the evidence presented during sentencing. Therefore, the military judge was required to resolve the conflict or enter pleas of not guilty on behalf of the petitioner. R.C.M. 910(h)(2).

II. THE AIR FORCE COURT OF MILITARY REVIEW, A MAJORITY OF WHICH DISAGREED WITH THE ORIGINAL PANEL'S DECISION, ERRED BY DECIDING THE CASE AT BAR *EN BANC*, APPARENTLY UNDER THE GUISE THAT THE PROVIDENCY OF THE PETITIONER'S PLEAS WAS A "QUESTION OF EXCEPTIONAL IMPORTANCE" WITHIN THE MEANING OF RULE 17 OF THE COURTS OF MILITARY REVIEW RULES OF PRACTICE AND PROCEDURE.

There was substantial disagreement among the Judges of the Air Force Court of Military Review as to the appro-

priateness of *en banc* consideration. *Felix,* 36 M.J. at 913, n.11. "There was no conflict among decisions of different panels on any issue in this case, and the punishment obviously does not extend to death." *Felix,* 36 M.J. at 913. The providency of a plea is not an unusual issue to be raised before the appellate judiciary. And although the issue is of exceptional importance to the petitioner, it is not a case that would ordinarily be viewed as exceptionally important to military justice.

As Judge Heimburg pointed out in his concurring opinion, the majority and the dissent hold significant differences of opinion on the nature of physical restraint as it applies to correctional custody. *Felix* at 912. However, as Judge Heimburg stated, resolution of the issue in this case did not require adoption of either view, since the issue was simply whether the petitioner's unsworn statement created a substantial conflict with his guilty plea. *Id.*

The majority, disagreeing with the original result reached by Panel 3 and apparently some of the dicta contained in the opinion, determined to bring the case before the Court, sitting *en banc.* Use of this procedure, whenever there is disagreement among the judges of the Courts of Criminal Appeals, does not appear to be the intent of the authors of the Court of Criminal Appeals Practice and Procedures, since specific prerequisites were denoted for *en banc* consideration.

The Air Force Court of Review's decision to consider the case *en banc* resulted in substantial prejudice to the petitioner, in that a decision had already been made by Panel 3 to set aside all of the findings of guilt and the sentence. The Court of Military Appeals stated in *United States v. Flowers,* 26 M.J. 463 (C.M.A. 1988) that it was concerned with proper compliance by the Courts of Military Review with Rule 17. The clear intent of Rule 17 is that a panel's decision is only to be disturbed under extra-

ordinary circumstances. The petitioner faced no death sentence. All four opinions agree on the standard to be applied when determining whether or not a plea was provident – therefore, there was no lack of uniformity in decisions. The decision of Panel 3 should have been left alone.

CONCLUSION

The questions presented are important to providing a meaningful understanding of what conduct is criminally proscribed under paragraph 70, part IV, MCM and the scope of the Court of Criminal Appeal's power to exercise *en banc* consideration or reconsideration of previously decided cases.

Respectfully submitted,

JAY LINDSEY COHEN
Colonel, United States Air Force
Chief, Appellate Defense Division
Counsel of Record

MARGE A. OVERLY
Captain, United States Air Force
Appellate Defense Counsel
Counsel for the Petitioner

AIR FORCE LEGAL SERVICES AGENCY
172 Luke Avenue, Suite 208
Bolling AFB, DC 20332-5113
(202) 767-1562

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